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In Memory of

HONORABLE WENDELL BERGE
(1903–1955)

An esteemed colleague of the Antitrust Bar passed away September 25, 1955.

This issue is a dedication to Mr. Berge in meager tribute to one of the greatest enforcers of our antitrust laws.

Mr. Berge was chief of the Antitrust Division from 1943–1947 and was head of that division when it launched for the first time a program of enforcing the antitrust laws against international cartels. Subsequently he served with the Small Manufacturers Emergency Committee, and engaged in the private practice of law in Washington, D. C.

ANTITRUST, ECONOMICS AND POLITICS

by

LEE LOEVINGER*

Protection of the public against the economic power of those in control of property or trade is one of the oldest, if not the oldest, principle of law. The oldest legal code known to man is contained on some clay tablets in an Istanbul museum. They date from the reign of a Sumerian king who reigned some 300 years before Hammurabi. The laws stated on the tablets provided for removing from office the "grabbers" of the citizens' oxen, sheep and donkeys, set up and enforced an honest system of weights and measures, and provided that the widow and orphan should not fall prey to the wealthy and powerful.[1] The code of Hammurabi, dating from about the twenty-first century B. C., was until recently the oldest known legal code and is still the most completely known of the ancient codes. One of the most remarkable features of this code is the extensive provisions it contains fixing prices and charges for services and seeking to protect the people against scarcity and overreaching.[2]

Throughout the more than forty centuries of human history from the time of these earliest codes, some corresponding or similar provisions have been found in the laws of all countries. An edict of the Roman emperor Zeno in 483 A.D. prohibited any price fixing combinations or monopoly, whether under a claim of royal grant or otherwise, and provided as punishment forfeiture of all property and perpetual exile.[3] An early penal code of China provided that anyone guilty of monopolizing or otherwise restraining the market in rice to gain an exorbitant profit should be punished with eighty blows on the back for each offense.[4]

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* Member, Larson, Loevinger, Lindquist, Freeman & Fraser, Minneapolis, Minn.

Note: This article is a partial condensation and substantial revision of an article by the same author published under the title *Antitrust and the New Economics* in 37 Minn. Law Rev. 505 (June 1953). More detailed references to and more extensive summary of certain of the authors referred to herein appear in the article cited.

1 Samuel N. Kramer, *The Oldest Laws*, Scientific American 188:26 (Jan. 1953).

2 William Seagle, *Men of Law* 26 (1947).

3 Loevinger, *The Law of Free Enterprise* 101, 347 (1949).

4 *Ibid.*

The earliest reported English case condemning restraint of trade was in 1415. There it was held that a contract seeking to diminish competition by binding one party not to engage in a particular trade was void.[5] According to the reports, although this was a civil case the judge emphasized the view he took of the matter by remarking: "Per dieu! If the plaintiff were here, he should go to prison until he had paid a fine to the king!" To prevent what was deemed extortion, the English Parliament fixed the prices of both commodities and services from time to time during the 14th, 15th, 16th and 17th centuries.[6] Similar legislation was enacted in the American colonies, and, after the Revolution, in the various States.[7] In 1602 the English courts declared all monopolies to be contrary to law and public policy.[8] The opinion in the leading case reasons that monopoly will result in an increase in price, in depreciation in the quality of goods, and in the impoverishment of those who had previously maintained themselves in the trade.[9] Shortly after this, in 1623, Parliament enacted the Statute of Monopolies specifically declaring all grants of monopoly void, except patents to inventors granting them a monopoly of their invention for a period not to exceed fourteen years.[10]

By the time of the Declaration of Independence, the common law of England and the American colonies, as stated by Blackstone, was that monopolizing and any combination to raise prices were recognized as offenses against the public trade, along with forestalling, regrating, engrossing, cheating and usury.[11] The common law at that time, as set forth in Blackstone's Commentaries, was that monopolies were punished by the award of treble damages and double costs to those who might be injured by them.

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5 *Id.* at 9; *The Dyer's Case*, 6 Year Bk. 5, 2 Hen. V, pl. 26 (1415).

6 See dissenting opinion of Justice Brandeis, *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, at pp. 305-306.

7 *Ibid.*; also see, Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania*, 1776-1860 (1948).

8 The Case of the Monopolies, *Darcy* v. *Allen* (1602), 8 Coke 125, Noy 173, Moore 673, 11 Coke 84.

9 *Ibid.*; also see, Loevinger, *Antitrust and the New Economics*, 37 Minn. Law Rev. 505, at p. 506 (1953).

10 St. 21 James I, c. 3 (1623).

11 IV William Blackstone, *Commentaries on the Laws of England* (4th ed., 1769) chap. 12.

Such law did not, of course, prevent the exploitation of foreign colonies. The rivalry of European nations to colonize America, as Adam Smith pointed out, arose largely from a desire to establish a monopoly of trade with the colonies for the benefit of "home" industries.[12] The profit gained by the colonizing country was, of course, at the expense of the colony. This led to hostility, opposition, and finally to revolution. The "Boston Tea Party" was an expresssion by the colonists of their opposition to the monopoly of sea trade held by the British East India Company. Probably the greatest single cause of the American Revolution was resentment against economic exploitation and opposition to monopoly.[13]

The Classical Theory of Antitrust

The legal foundations of antitrust law are very ancient. The rules outlawing restraint of trade and monopoly were well established in the common law before the American Revolution. However, like many other rules of earlier legal systems, these were practical responses to felt necessities of social living and had little, if any, theoretical rationalization. Indeed, the rules against restraint of trade and monopoly continued to exist in the law along with rules against "forestalling," "engrossing" and "regrating," early common law offenses the essential element of which was buying goods for the purpose of re-selling them at a higher price. The most generally held view up to the latter half of the eighteenth century was that prices should be established either by the government or by the semi-governmental mercantile guilds at a "fair" or "just" level, and that it was improper, and probably illegal, to sell or buy at any other price. Thus the common law, while seeking to curb the acquisition or exercise of undue economic power by any individual, did not regard competition as much more than an incidental feature of ordinary economic activity.

In 1776 Adam Smith published his great treatise, *"An Inquiry Into the Nature and Causes of the Wealth of Nations."* The work was quickly acclaimed and has had an enduring influence. It is,

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12 Adam Smith, *The Wealth of Nations*, 574, 595 (1776; Modern Library ed., 1937).

13 Loevinger, *The Law of Free Enterprise*, 11 *et seq.* (1949); Stocking and Watkins, *Cartels or Competition*, 7 (1948).

perhaps, not too much to say that it is one of the most influential books that has ever been published. Most economic writing since that day (including that of Marx) has taken Smith as a point of departure. The most significant contribution of Smith was his construction of a theoretical model of the economic system, and the postulation of principles for its proper performance.

The wealth of a nation, Smith said, is the total product of its annual labor. The productivity of labor depends upon the efficiency of the system of exchange, which will permit specialization so those who labor to produce one goods may exchange their product with those who labor to produce another. The best balance of production and consumption and the best distribution and division of labor will be achieved by a system in which prices are determined solely by the force of competition in a free market, rather than by government or guilds or other combinations. The natural price of a commodity is that which is just sufficient to pay the rent of the land, the wages of the labor and the profit of the capital employed in producing it. The market price may be either above or below the natural price, but always gravitates toward and tends to approximate the natural price. If supply is greater than demand, then the price tends to go down and some producers are driven out of the field. If the demand is greater than the supply, then the price tends to go up and new producers are attracted into the field. Smith was well aware that many factors might operate to disturb the natural balance of economic forces. Such interference was in all cases undesirable, and in the long run could not prevail. He recognized the influence of monopoly and condemned it in unqualified terms. Monopoly is bad, he said, both because it tends to extract the highest price "which can be squeezed out of the buyer," and also because it is "a great enemy to good management" which can never be established but as a result of "free and universal competition." [14]

It is clear that Smith thought of competition as involving the rivalry of many buyers and sellers for the same commodity in one market. He thought of a competitive price as one that is annoymously established, in the sense that no single buyer or seller can significantly control it by his own action. Monopoly, in contrast, was the situation in which a single seller had complete, or nearly complete, con-

[14] Adam Smith, *The Wealth of Nations*, 61, 147 (1776; Modern Library ed., 1937).

trol of a market and thus was able effectively to influence the price by his own action. Even the monopolist could not set any price he chose, but the limits on his actions were those set by the ability and tolerance of the buyers, not by the natural laws of competition.

The views of Smith were elaborated and refined in the writings of dozens of economist and political theorists during the nineteenth century. Among the best known and most influential of Smith followers were Jean Baptiste Say, David Ricardo and Alfred Marshall. Say promulgated the Law of Markets that bears his name, and which consists of the assertion that the act of producing goods necessarily provides the requisite purchasing power for buying them, thus maintaining an invariable equivalence between what is produced and the purchasing power necessary to secure its consumption. Ricardo worked out the most rigorous formulation of Smith's system, promulgating what has been characterized as "the iron law of wages." According to Ricardo, the natural level of wages is only so much as will enable the laborer to live and reproduce. Any increase in wages above this will lower profits, and if prices are increased generally this will have no effect, merely changing the value of the medium of exchange.

The most adequate and mature presentation of the classical theory of economics was given by Marshall, whose *Principles of Economics* was published in 1890. Marshall was considerably more realistic in his view of competition than earlier economists. He recognized that in practice competition would differ from the theoretical model, and noted many factors tending to restrict the freedom of markets, including law, custom, trade union regulations, inertia, sentiment, geographical isolation, the immobility of fixed capital, and the time lag involved in any substantial market change. Nevertheless, he believed in the continuing power of competition as a regulator of economic activity, and was confident that ultimately competition would establish equilibrium between the forces of production and consumption.

There can be no doubt that these economic views were the foundation of the federal antitrust laws.[15] The resolution that was first introduced in Congress by Senator Sherman in 1888, which was later to lead to the Sherman Act, called for legislation to prohibit

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[15] Hans B. Thorelli, *The Federal Antitrust Policy* (1955).

arrangements that might "tend to prevent free and full competition," or "tend to foster monopoly or to artificially advance the cost to the consumer." [16] The debates on the proposed antitrust act showed that Congress regarded competition as the life of trade and the norm of business activity.[17] The mighty business combinations called "trusts" were endangering freedom of enterprise and also democracy itself by corrupting government and threatening the freedom of independent thinking in political life.[18] Accordingly, Congress passed the Sherman Act with the direct and specific aim of eliminating and preventing any restrictions on competition.[19] This would, it was thought, prevent exploitation of the consumer, permit the economy to function free from "artificial" restraints, and prevent the corruption of politics by large aggregations of wealth.

Under the influence of Adam Smith and the classical economic theory, the laws against forestalling, regrating and engrossing had been repealed, and belief in free trade and competition had become the faith of the age. In most of the nineteenth and the early part of the twentieth century it was confidently believed that if only the government would prevent any interference with free and universal competition, then the economy would, in the long run, function as efficiently as it was capable of doing. This was the classical theory of the antitrust laws.

The Discrepant Criticisms of Antitrust

The antitrust laws have been the object of criticism almost since their enactment. The overwhelming weight of the criticism over the years has been that the laws were too feeble and ineffective. The passage of the Clayton and FTC acts in 1914 was in response to an insistent demand for strengthening the Sherman Act.

In recent years a new note has been struck: the antitrust laws are attacked on the one hand because they have not been effective in preventing th growth of big business, and on the other hand, because they are an undue hindrance to the development of big business! The two schools are irreconciliable in both assumptions and conclu-

16 *Id.*, at 166.
17 *Id.*, at 226.
18 *Id.*, at 227, 565.
19 *Id.*, at 571.

sions. The anti-big[20] group points to the growth of giant business concerns and the increase in the concentration of economic power since the passage of the antitrust acts as evidence of their ineffectiveness, takes this as proof of the decline in the prevalence of competition, and infers that economic collectivism is thus increasing with socialism or nationalism in some form as the inevitable result. The pro-big group points to our increasing wealth and prosperity, correlates this with the growth of big business, takes this as proof that big business has caused our wealth and prosperity and that our welfare depends on big business, notes the antipathy of most antitrust advocates to big business, and then, either directly or indirectly suggests that the rigor of the antitrust laws should be relaxed in order to encourage the development of big business.

Much of the debate stems from the publication in 1932 of the now famous study by Berle and Means, *The Modern Corporation and Private Property*. Based upon careful research and analysis by an economist and a lawyer, this study drew attention to the astonishing degree of control which a relatively few corporate enterprises had secured in the economy of the country. The two hundred largest non-banking corporations were said to control approximately one-half of the corporate wealth of the United States. The authors stated that corporations had ceased to be merely legal devices through which private business transactions were carried on and had become, in fact, a means of organizing the economic life of the country. Further, the corporate system has created within itself a centripetal attraction which draws wealth together into aggregations of constantly increasing size, at the same time throwing control into the hands of fewer and fewer men, with no limit in sight to this trend. Such data led Thurman Arnold, then a law school professor, to declare that the antitrust laws were merely ceremonial parts of our folklore, which, so far from hindering the formation of monopolies, actually created an environment in which concentrations of economic power could flourish.[21]

On April 29, 1938, President Franklin D. Roosevelt sent a message to Congress calling attention to the growing concentration of

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20 I know that "pro-" and "anti-big" are poor terms to describe the viewpoints respectively referred to; but it is convenient to have some names and these are the best that I can think of.

21 Thurman Arnold, *The Folklore of Capitalism*, 212-214 (1937).

economic power and the decline of competition.[22] President Roosevelt said that the choice was between the diffusion of economic power and its transfer to government; big business collectivism compels an ultimate collectivism in government. The existing antitrust laws were called inadequate, but the President said it was not proposed to abandon but to strengthen them. He called for a "thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition."

In response to this request, Congress created a Temporary National Economic Committee composed of senators, congressmen and representatives of numerous executive departments and administrative agencies.[23] The TNEC worked for two years and nine months, heard 552 witnesses and produced 80 volumes. Its report[24] undoubtedly represented the composite views of a larger and more varied group of distinguished men than any other single expression on this subject. The report declared the country's faith in a competitive economic system on the classical model, saying that the only alternative to competition is some form of concentrated government authority which might easily destroy democracy. It stated that the public policy embodied in the antitrust laws remained sound and that in all the hearings held before the committee no witness so much as suggested any substantive change in the basic philosophy of those laws. It noted the gradual attrition of competition and recommended various specific measures to secure the continuance of our democratic economic and political system. The principal recommendations were for strengthening the antitrust laws in several respects and for their vigilant and vigorous enforcement.

Shortly after the TNEC report was issued, the United States became involved in World War II, and even such pressing matters as the structure of our internal economy were forgotten in the heat of that struggle. However, in the post-war period attention has again turned to such problems and there have been a number of

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22 Sen. Doc. 173, 75th Cong., 3d Sess. *Final Report and Recommendations of the Temporary National Economic Committee*, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941) p. 11, *et seq.*

23 David Lynch, *The Concentration of Economic Power* (1946). This is an excellent account and summary of the formation, investigations and data gathered by the TNEC.

24 *Final Report and Recommendations of the Temporary National Economic Committee*, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941).

official investigations and reports relating to antitrust issues, although no investigation approaching that of the TNEC in scope has been undertaken since. In 1947 a study was made by a staff under Congressman (now Senator) Kefauver of the effectiveness of government efforts to combat economic concentration. Mr. Kefauver epitomized the conclusion in these words:

> "The record shows an alarming picture of the inadequacy of present methods in combating further increases in economic concentration. Concentration of economic power is a constantly moving, powerful force which can only be fought by an aggressive and consistent Federal legislative program, followed up by a steadily continuing active enforcement of antitrust laws by the executive agencies." [25]

In 1953 Attorney General Brownell, with the approval of President Eisenhower, established a National Committee to Study the Antitrust Laws. This committee did not undertake to hold any hearings, but rather drew upon the resources of its members, who were principally lawyers, law professors and economists. On March 31, 1955 the Committee rendered its final report. The report consists of a lengthy and detailed summary of the applications and interpretations given to the antitrust laws by the courts. The group recognizes that the objective of the antitrust laws is the protection of competition, and, acknowledges this objective as a basic tenet of our faith in our system of economic organization. The report does not undertake to evaluate how well the antitrust laws are serving their objective. The Committee makes a number of recommendations, mostly of a technical nature and none of which would involve any fundamental change in the antitrust laws. However, the major concern of the majority of the Committee, as well as the impact of most of the recommendations, is to safeguard the position of defendants in antitrust actions rather than to increase the effectiveness of the laws in achieving their objective.

Essentially the same position is taken by a number of popular writers in recent years. James Truslow Adams[26] and Peter Drucker[27]

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25 *United States Versus Economic Concentration*, Staff Report to the Monopoly Subcommittee of the Committee on Small Business of the House of Representatives, 79th Cong. (1947), at ix.

26 James Truslow Adams, *Big Business in a Democracy* (1945).

27 Peter F. Drucker, *Concept of the Corporation* (1946).

have both written rather effusive accounts of the position of big business in our society, each taking General Motors as the prototype of benevolent big business. Both authors laud big business both for its efficiency and its ethics but are careful to decry monopoly and to make clear that competition is an essential element even of a big business economy.

The most fortright attack upon the antitrust laws has been made by David Lilienthal in a series of magazine articles which were later expanded into a book.[28] Mr. Lilienthal is lyrical in his praise of both big business and of Bigness (sic) in business, and is uncompromising in his denunciation of the antitrust laws. Unfortunately, it is difficult to take this argument very seriously since Mr. Lilienthal does not seem to know what he means by either one.[29] He says that the advantages of big business can be achieved without going to extremes of size, and that we should have "moderate and sensible Bigness." However, he uses General Motors, DuPont and a 215 acre farm as examples of the advantages of Bigness. So far as the antitrust laws are concerned, Mr. Lilienthal gives no evidence of ever having read a court decision in the field completely through. His proposal is that we substitute for the antitrust laws a government policy of promoting productivity and "ethical and economic distribution of this productivity." How the government can promote productivity or economic ethics without forbidding monopoly and restraint of trade is neither discussed nor hinted. Aside from a slight flurry of discussion at the time of publication, Lilienthal's naive and confused notions seem to have made little impression on any of those seriously concerned with this subject.

The viewpoint diametrically opposed to that of Lilienthal is supported with equal vehemence, though somewhat better buttressed with facts drawn from his experience, by T. K. Quinn, a former vice-president of General Electric.[30] Mr. Quinn believes in the value and necessity of competition in the classic sense, including price competition. This, he says, is being destroyed by the growth of giant business enterprises and mergers, and by "co-operation," gentlemen's agreements, price leadership and mutual self-restraint. The growth of

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28 David E. Lilienthal, *Big Business: A New Era* (1953).

29 See Loevinger, *Antitrust and the New Economics*, 37 Minn. Law Rev. 505, at 521 *et seq.*

30 T. K. Quinn, *Giant Business: Threat to Democracy* (1953).

business giants is not, as some contend, due to superior efficiency or competitive success. Rather it is the result of the tremendous advantages of large amounts of capital and of the ability to engage in extensive and expensive advertising. Operating costs of the smaller companies are actually less than those of the giants; and even in the field of research, usually cited as the special domain of big business, Quinn says that the greatest contribution comes from small business. The growth of giant corporations is making us a nation of employees. The struggle for bigness is essentially a quest for power; and one of the worst indictments against big business is that its officials, like other humans, are corrupted by too much power, come to identify their own interests with those of society, and trample heedlessly on the rights of others. The trend toward aggregations of power in big business and big government leads, at its best to socialism, and at its worst threatens to undermine the foundations of free society and create a tyranny more ruthless than any mankind has known. From these considerations Quinn concludes that we must strengthen and vigorously enforce the antitrust laws or both economic and political freedom will perish in this country.

Certainly the most scholarly and probably the best balanced of the many critiques of the antitrust laws that have appeared to date is the work of two economists, Joel B. Dirlam and Alfred E. Kahn.[31] They consider the recent attacks on antitrust policy, particularly those of economists who seek to temper the rigors of antitrust enforcement in favor of big business. Dirlam and Kahn postulate that the broad purposes of antitrust policy are, first, to prevent the unfair exertion of bargaining power and insure that the economic process conforms to the community's sense of fairness and equity, second, to preserve the competitive system of checks and balances and assist its functioning, and, finally, to secure such social and political ideals as the diffusion of private power and the maximum opportunity for individual self-expression. They consider both the legal and the economic standards for antitrust policy in the light of these objectives, and then make a careful case by case analysis of recent antitrust decisions and their implications. Finally, they come to the conclusion that they must reject alike the proposals for changing the antitrust laws that spring from hostility or friendliness to the present business sys-

[31] Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* (1954).

tem. The advocates of change designed to reorganize market structures to make them more purely competitive have demonstrated no necessity for such a change. On the other hand, neither have the critics who would weaken the antitrust proscriptions offered any evidence that would make a case for such changes, and the analysis of the cases by Dirlam and Kahn indicates that any weakening of the antitrust laws would produce a poorer, not a superior economic performance.

Competition in Contemporary Economic Theory

The model of the economic system propounded by the classical school still remains the one most popularly accepted and that most familiar to lawyers and judges. Perhaps this is due to its simplicity, for the concepts developed by economists during the last twenty-five years have tended to complicate the classical model considerably.

Among the most fundamental revisions of classical theory are those of John Maynard Keynes, an Englishman whose ideas have had a profound effect on much American thinking. Undoubtedly the theories of Keynes have had a great influence on governmental policy in this country during the last two decades. The principal problem to which Keynes addressed himself was the instability of the economic system, its failure to provide for full employment at all times, and its arbitrary and inequitable distribution of wealth and income.[32] He took as the conditions of the problem, the existing social structure, including available labor and capital, existing industrial techniques, and the current degree of competition. Keynes observed that it is characteristic of the economic system that while it is subject to severe fluctuations of production and employment, it is not violently unstable. Indeed, it seems capable of remaining in a chronic condition of subnormal activity for substantial periods without any marked tendency either toward automatic recovery or complete collapse. While fluctuations of the economic cycle start briskly, they generally wear themselves out before proceeding to extremes, and the normal situation is an intermediate one between a severe

[32] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (1936). This work is the definitive statement of Keynes' theories. Although it was not published until 1936 many of the ideas it contained had previously been stated by Keynes in speeches and papers. It is worth noting that Keynes himself said that his economic theory did not supersede the classical theory but merely generalized it. *Id.*, at 3.

depression and great prosperity with full employment. This is contrary to the predictions of the classical theory which holds that in the absence of artificial restrictions on the market, the economy will constantly tend toward a condition of equilibrium at the point of optimum employment and production.

Keynes reaches the conclusion that conditions which are capable of explaining the observed results are that the variations in production, interest or employment in the economy generally are associated with moderate, but not proportionate or compensatory, changes in consumption, investment and wages. In essence, he says that changes in prices, interest or wages are correlated with changes in the supply of goods, money and labor—as stated in the classical theory; but that the changes in prices, interest and wages are not held by any economic law or force to such magnitude as automatically to compensate for the precise changes that have occurred in the supply of goods, money or labor. Thus, whereas the classical theory reached the conclusion that given a condition of free competition the economy always tended toward equilibrium at a point of maximum production and employment, Keynes concludes that the economy does not have any inherent equilibrium, but may remain for an indefinite period either at any point between full production and employment and complete collapse or in oscillation around any such point.

Keynes theory succeeds in achieving the intellectual "repeal" of Say's law of markets and Ricardo's law of wages. While the classical theory correctly indicates the direction of the adjustment that will be brought about by changes in production of goods, employment of labor or variations in prices or wages, it does not correctly predict the volume or magnitude of such adjustments. Thus some central control, or government intervention, is justified even in a competitive economy in order to insure full production and employment. The homely popular phrase for this was "pump priming." It should be noted that this theory justifies only limited government intervention, not state ownership or control of the instruments of production. Keynes avows his belief in the traditional advantages of individualism and competition—the decentralization of decision, extension of the field of personal choice and the encouragement of economic experimentation.

A modification of classical theory even more central to the theme of competition is that introduced by Edward Chamberlin. He criti-

cizes the classical view of competition, offering in its place a "theory of monopolistic competition." [33] He points out that monopoly ordinarily means control over supply, and therefore over price. Pure competition implies the absence of such control in any one enterprise, which means there must be a large number of buyers and sellers so that the influence of any one is negligible, and the goods must be homogeneous and be sold in the same market for all. In the classical analysis there is a separate theory for the pricing phenomena of a market when it is either competitive or monopolistic, but none for a market which is intermediate between the two. However, analysis of actual markets reveals that these two elements are complexly interwoven throughout the price system, with all markets showing some characteristics of each.

Chamberlin says that monopoly is meaningless without reference to the classification and differentiation of the thing monopolized. There may be perfect monopoly of one product which yet falls short of control of a more general class of which that product is a part and within which there is competition. There is differentiation of any product in an economic sense if any significant basis exists for distinguishing it from the product of another seller. The basis may be real or fancied, important or unimportant, so long as it is sufficient to lead buyers to a preference for one product over another. Thus every seller of a product which is in any way differentiated has, in some degree, a kind of monopoly. The number of sellers in a field cannot be taken as a necessary indication of the degree of competition or monopoly, since the number in the field depends, first of all, upon how broadly the field is defined.

These considerations make it clear, according to Chamberlin, that a pure monopoly is reached only in the case of control of the supply of all economic goods when the competition of substitutes is excluded by definition. Similarly, pure competition can be reached only where large classes of goods are perfectly standardized and are offered at the same time and place by a large group of sellers to a large group of buyers, so that every seller faces the competition of a number of perfect substitutes for his product. Thus it can be seen that these are unreal abstractions. Both monopoly and pure competition are merely limiting conceptions which mark the ends of a continuum

[33] Edward Chamberlin, *The Theory of Monopolistic Competition* (1933; 6th ed., 1948).

upon which are represented all gradation between the two extremes. Actual markets are always a mixture of the two elements of monopoly and competition, necessarily lying some place on the continuum between the two abstract limiting cases.

From these elements Chamberlin constructs a theory of pricing which is designed to fit the numerous situations arising from variations in the numbers of sellers and differentiation of the products. In brief, the theory of monopolistic competition holds that prices will tend to vary from the purely competitive price and to approximate the monopoly price to a degree depending upon the control which the dealers have in the market and their knowledge of the probable behaviour of other sellers in the same market. For example, if differentiation of the product is slight, even though the seller has perfect control over the particular product, his control over price will be negligible or non-existent because of the competition of substitute products in the same market. But a seller who has, instead of a monopoly of a brand, a monopoly of an entire class of products, has much greater control over price. "The more substitutes controlled by any one seller, the higher he can put his price." [34]

In a market with a limited number of sellers, if the sellers combine, there is obviously monopoly and control of the price. Likewise, if sellers in a market consciously act with regard to their *total* (rather than individual) influence upon the price, the price will be a monopoly one. If the sellers in a market of a few sellers act independently, the price will depend upon the numbers, assumptions and knowledge of the sellers. To the degree that the sellers are numerous and act without knowldge of or regard for the actions of the others, the price will approach the competitive price. To the degree that the sellers are fewer in number and know or correctly assume the actions of the other sellers and the aggregate influence of the sellers on the market, the price will approach the monopoly price. A similar analysis applies to the competitive factors other than price.

Although not all of the implications or technical consequences of this theory are universally accepted, the work of Chamberlin, as of Keynes, has influenced economic thinking generally toward a more realistic understanding of the forces actually at work in the economic environment, particularly of the nature of competition. Contempo-

[34] *Id.*, at 67.

rary economists have become less interested in constructing models to illustrate pure competition in ideal markets, and have turned their attention more to the search for methods of analysis and prediction of the performance of actual markets in which competition is imperfect.[35]

Thus, analyzing the performance of markets with a structure that is oligopolistic, or confined to a few, as contrasted with one that is monopolistic, William Fellner notes that the larger and less co-ordinated the group in the market, the more likely it is to act competitively; and conversely, the smaller and more co-ordinated it is, the less likely it is to act competitively.[36] Even though there may be a limited number of firms in the market, independent action may be expected if none of them is large in relation to the market, in the absence of some sanctions against independent action, since the effect upon the market or the other firms of the action of any one will not be sufficient to outweigh considerations of self-interest. However, as soon as any of the firms in the market become of such size that they affect one another to a noticeable extent by their individual policies, then "spontaneous co-ordination" may be expected to arise in that market, since it is then profitable and possible to avoid engendering competition by taking any action that would have such a result.[37]

That the "perfect competition" of the classical model is not only impossible but is also undesirable, is the contention of J. M. Clark.[38] He contends that what we really want and what we have at least a chance of achieving is a kind of "workable competition." To Professor Clark this means an economic structure in which competition is limited as to area of operation by law and in which competition is supposed to produce not simply cheapness of product but also, and perhaps more importantly, quality of product, diffusion of opportunity to engage in business and enlargement of the choice and opportunity for employment.

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35 For the views of many eminent contemporary economists see *Monopoly and Competition and Their Regulation*, Papers and Proceedings of a Conference held by the International Economic Association, edited by E. H. Chamberlin (1954).

36 William Fellner, *Competition Among the Few* (1949).

37 *Id.*, at 41, *et seq.*

38 J. M. Clark, *Competition and the Objectives of Government Policy*, *op. cit. supra* note 35, at 317, *et seq.*

Clark contrasts competition with security because the drive for security is the most powerful limiting force on competition, and because competition and security represent polar conditions in the business environment.[39] Monopoly is attractive to business as much because it represents secure and easy profits as because it offers the opportunity for exorbitant profits. Thus monopolies do not by any means always tend to seek the highest price that can be gotten, but rather to fix prices at a level which will give a satisfying profit and which is higher than economically justified, and then to maintain them at that level. Monopoly prices thus tend to be "sticky," or unresponsive to changes in economic conditions. A monopoly, therefore, can do plenty of harm if it uses only a fraction of its power. Clark believes that competition is still the main safeguard against economic exploitation in our civilization; but he does not think that competition, in order to be workable, must correspond to the models of the economists. Rather, he says, that business competition in practice "exhibits almost infinite variety."

One of the most recent and original suggestions in the field is that of John Galbraith, who introduces the new concept of "countervailing power." [40] Galbraith points out that in the classical system competition, if rigorous, is a sufficient condition for the successful operation of the economy. The self-regulatory mechanism in the economy and the incentive to socially desirable behaviour on the part of business is furnished by the competition of those on the same side of the market. But in practice we do not have markets with competition such as that postulated, but rather a fairly high degree of concentration with a relatively small number of firms both in individual markets and in the economy as a whole.

Modern economists have observed that under these conditions the market of a few sellers commonly establishes a convention outlawing price-cutting as a weapon of economic warfare, but not preventing innovation or technical improvement. Consequently, even under oligopoly there remains an attenuated but still workable competition which minimizes the scope for exercise of private economic power and makes this structure preferable to any available alternative. So,

[39] J. M. Clark, *Alternative to Serfdom*, 61 *et seq.* (1948).

[40] John K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952).

while the market concentration of American industry does not operate at any given moment to encourage the largest possible production at the lowest possible price, it is favorable to technical progress.

Galbraith believes that this analysis, while valid so far as it goes, is inadequate by itself to explain the relatively satisfactory performance of the economic system. Economists have failed to see that the long trend toward concentration of industrial enterprise has brought into existence not only strong sellers but also strong buyers. The same process which impaired the restraints on private power on one side of the market operated to create new restraints on such power on the other side of the market. Galbraith calls this counterpart of competition "countervailing power."

Galbraith contends that the scope and effect of countervailing power is wider than might be supposed at first impression. At the end of virtually every channel by which goods reach the public there is a layer of powerful buyers, so most positions of market power in production are covered by positions of countervailing power. Countervailing power, as thus conceived, performs an indispensable function in the modern economy, and our governmental policy should be as concerned with strengthening countervailing power as with strengthening competition.

The theory of countervailing power has certain inherent and extremely important limitations. First, it will operate as an effective restraint on market power only when there is a relative scarcity of demand. The buyer must be of sufficient importance to the seller so that there is some degree of compulsion or interest in complying with the buyer's demand, otherwise the buyer will have no power. Second, countervailing power cannot operate at all in a market dominated by a single seller, or a group of co-ordinated sellers. For countervailing power to be effective it is necessary that the buyers have some alternatives. A few large buyers opposed in a market to a few large sellers may play off one seller against the other, or at least have an opportunity to shift their trade from one to the other if there is anything less than a perfect coalition between the sellers. Without this degree of flexibility in the market there is no opportunity for the operation of countervailing power. Thus this theory supports the classical theory in the conclusion that there is something uniquely evil about monopoly.

A third limitation is that countervailing power does not exist where industries are integrated vertically. Industries which control their own distributing as well as manufacturing facilities, whether through ownership or influence over dependent dealer organizations, are not faced with countervailing power. Finally, in an inflationary period countervailing power loses its effectiveness. During inflation the demands for increases in prices and wages become more insistent and the incentives to resist such demands become less potent since any increases can easily be passed on to consumers. Consequently, countervailing power must not be supposed to exert an automatic check on inflationary movements, as it may actually operate to reinforce them.

With all of its limitations, this concept obviously broadens the scope of economic theory to include important and previously unrationalized aspects of economic behaviour. Galbraith suggests that there are important policy considerations which follow from this. While there are good reasons for government action attacking positions of original market power in the economy, there is no justification for attacking positions of countervailing power and leaving positions of original market power untouched. This would ordinarily be inequitable and damaging to the economy. This does not mean that an exemption of countervailing power should be written into the antitrust laws. It does indicate that before action is taken against the possession and exercise of market power the question should be asked: Against whom and for what purposes is the power being exercised.

This rationale does offer some theoretical justification for the exclusion of labor and agriculture from the general operation of the antitrust laws, a matter which has bothered many who believed in the fundamental wisdom of antitrust policy. Both labor and agriculture have traditionally been in the position of numerous weak sellers offering services or goods to a few powerful buyers. Without some form of organization on the side of labor and agriculture, their relative bargaining power would be puny in relation to the enterprises with which they must deal on the other side of the market. By giving at least a limited exemption to labor and agriculture to permit them to organize effectively for the purpose of dealing with the purchasers of their services and goods, we encourage the develop-

ment of countervailing power at points where it is thought to be desirable, if not essential.

Thus the theory of countervailing power directs attention to the relative strength of the parties in a market situation and suggests that this is a factor which cannot be overlooked in any complete analysis. The theory also supports the antitrust policy of seeking to prevent monopoly, monopolization or quasi-monopoly. Under this theory, it is desirable or essential to prevent or remedy monopolistic control of a market, since there must be some degree of competition in operation in order to permit countervailing power to exert any influence.

The Legal View of Monopoly

While the economists have been analyzing the meaning of "competition" the courts and lawyers have started with the other end of the spectrum and have sought to define "monopoly." There is a sound reason for this difference in approach. The economists have had the task of observing the phenomena of economic life and then constructing a conceptual model that would serve either as a norm or as a method of explanation and prediction. The behaviour with which economics has traditionally been concerned has been predominantly competitive behaviour, and the most generally approved norm, as well as the most widely applicable concept, has been that of competition. Monopoly has been largely an abstraction to the economists which they have used to contrast with, or modify, the concept of competition.

In contrast, the courts have not been concerned with setting standards for ideal, or even for desirable, conduct, but with defining that conduct which is so anti-social as to be proscribed by law. Thus the law does not require competition but rather prohibits monopoly.

Abstractly it might seem that as competition and monopoly are antonyms a definition of one would necessarily imply a definition of the other. In practice it has not been so, particularly where the definition of competition has been that of economists and the definition of monopoly that of lawyers. The courts have had the same difficulty in defining monopoly as the economists have had with competition. The problem arises only in the setting of a specific case involving concrete facts. But facts are recalcitrant and do not

fit easily into theoretical patterns. With possibly a single exception,[41] the courts have never been faced with a "perfect" monopoly; and, apparently, are unlikely ever to be faced with one.

Nevertheless, it is obvious that the antitrust laws arose out of an apprehension of evils that might result from actual, not imaginary situations. Consequently, if the courts are to give any practical effect to the laws they must be willing to apply the laws—and the concept of monopoly—to at least some of the situations which actually arise. Accordingly the legal concept of monopoly has been broadened to include a substantial part of the competition-spectrum lying somewhere along the continuum between perfect monopoly and perfect competition.

Ideally the competition-monopoly-continuum should be divided by at least a theoretical demarcation somewhere near the middle, on one side of which lies economic competition and on the other side of which lies legal monopoly. If the economists were successful in defining their concept of competition to include so much of the competition-spectrum as contained socially desirable conduct, and if the lawyers were successful in defining their concept of monopoly so as to include such conduct as is socially undesirable, and if the standards used coincided, then there would be such a demarcation. Clearly these conditions do not prevail and are not likely to be satisfied. So we may expect that there may be both overlapping and gaps in the division of the field between the concepts of the lawyers and the economists. Some conduct may be competitive to the economists and still be monopolistic to the lawyers; other conduct may be non-competitive to the economists and yet be not monopolistic to the lawyers. But (except for the few situations in which the law, for reasons of policy, condemns a particular kind of competitive activity) these situations should be the rare exception and should be regarded as evidence of the crudity of our conceptual analysis. If law and economics are to be more than mere classroom exercises, there should be some consonance between the economic definition of competition and the legal definition of monopoly, and ordinarily the two should be mutually exclusive.

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41 The only reported case that appears to involve a "perfect" monopoly is *United States* v. *Pullman*, 50 F. Supp. 123 (1943); *subsequent proceedings*, 53 F. Supp. 908 (1944); 55 F. Supp. 985 (1944); 64 F. Supp. 108 (1946); *aff'd.* 330 U.S. 806.

The principles of the law suffer some loss of logical symmetry by the fact that they are all born in the matrix of individual cases. Making due allowance for this fact, and taking the leading decisions as a group, it appears that the courts have neither been wholly unrealistic nor seriously at variance with their contemporary economic theorists.

Modern antitrust law may conveniently be dated from the *Standard Oil* decision.[42] The Supreme Court there declares that, although monopoly at common law meant a grant by the sovereign of the exclusive right to certain trade, in this country the term has come to mean any acts from which the evils consequent to monopoly might flow, and not simply the particular kind of monopoly regarded as such at common law. The court says that the congressional debates conclusively show that the main cause which led to enactment of the Sherman Act was the belief that the vast accumulation of wealth in the hands of corporations and individuals created power which had been and would be exerted to oppress other individuals and the public generally. The dread of enhancement of prices and of other wrongs which were thought to flow from undue limitation of competition led, as a matter of public policy to the prohibition of all contracts or acts which were unreasonably restrictive of competitive conditions.

Almost immediately after enunciating this "rule of reason" in the interpretation of the Sherman Act, the court elucidated it further in the *American Tobacco* case.[43] The court there explained that the statute did not forbid the making of "normal or usual contracts to further trade by all normal methods," but that it did prohibit acts which by their character were not normal competitive business methods but were, rather, methods tending to or aimed at a restriction of competition.

In both the *Standard Oil* and *American Tobacco* decisions the court had found that the defendants had acquired their monopoly power by predatory and improper means. In the *United States Steel* case[44] and the *International Harvester* case[45] the court held that mere size of an enterprise, no matter how impressive, does not constitute

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42 *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

43 *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

44 *United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920).

45 *United States* v. *International Harvester Co.*, 274 U.S. 693 (1927).

monopoly, and that the possession of unexerted power, accompanied by neither unlawful conduct in its exercise nor intent to use it, is not an offense against the antitrust laws. However, as Justice Cardozo pointed out in the *Swift* case, although size itself is not an offense against the Sherman Act, "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[46] Further, as the court makes clear in the *Columbia Steel* decision,[47] it is not size by itself or as an abstraction that carries significance in the antitrust field, but *size relative to the market.*

The courts say, in effect, that monopoly, in the legal view, is the power to exclude competition or to raise prices when it is desired to do so.[48] This does not, of course, mean the power to exclude competition altogether or to manipulate prices to any degree, but rather means that legal monopoly is the power to control a market to a substantial degree. However, the antitrust laws forbid "restraint of trade" and any act or attempt "to monopolize," rather than "monopoly" as such. Consequently the courts have held that some overt act is an essential element of the offense forbidden by the antitrust laws. Thus the mere passive possession of monopoly power, in and of itself, is not an offense against the law. What is an offense against the antitrust laws is (a) an acquisition (or attempted acquisition) of monopoly power, (b) any exercise of monopoly power, however acquired, to foreclose competition, to gain a competitive advantage, or to injure a competitor, or (c) mere possession of monopoly power coupled with a purpose or intent to exercise it.[49] The Supreme Court has noted that the monopolization which is thus forbidden by section 2 of the Sherman Act is in large measure, but not entirely, merely the end product of conduct which violates section 1.[50]

Thus the basic provisions of the antitrust laws, which are contained in the Sherman Act, essentially forbid all acts which amount

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46 *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

47 *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948).

48 *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

49 *United States* v. *Griffith*, 334 U.S. 100 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (C.A. 2nd 1945).

50 *United States* v. *Griffith*, 334 U.S. 100, at 106 (1948).

to undue or unreasonable restrictions of competition or to the acquisition or exercise of the power substantially to control any market or to exclude or unreasonably limit competition within it. Although the Clayton Act and the Federal Trade Commission Act, with their several amendments, contain somewhat more detailed statutory specifications of conduct that is prohibited by these principles, it still remains true that the interpretation and enforcement of the antitrust laws rests very largely upon the understanding of the courts as to what competition is and as to what constitutes "reasonable" economic conduct.

Consequently it seems essential that the courts and lawyers concerned with these laws should have some understanding of the major lines of economic thought regarding these problems, some acquaintance with the nature of the conditions and problems to which the laws are intended to apply, and a clear view of the objectives toward which the laws are aimed. As the Supreme Court itself has remarked, the restrictions of the Sherman Act are cast in general and adaptible provisions which are not to be applied in a mechanical or artificial manner, but are to be interpreted to attain its fundamental objectives.[51] "The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon the courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed." [52]

The Social Objectives of Antitrust Policy

In considering cases under the antitrust laws, the courts have often made reference to the purposes of antitrust policy. Most often mentioned have been the general aims, such as prevention "of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions," [53] and the preservation for the public of "the advantages that flow from free competition." [54] However, as early as 1897 the Supreme Court recognized that the protection and preservation of small business was one of the important goals of the Sherman Act. In the *Trans-*

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51 *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, at 359-360 (1933).

52 *United States* v. *Columbia Steel Co.*, 334 U.S. 495, at 526 (1948).

53 *Standard Oil Co.* v. *United States*, 221 U.S. 1, at 58 (1911).

54 *Northern Securities Co.* v. *United States*, 193 U.S. 197, at 332 (1904).

Missouri Freight case it said, "Trade or commerce . . . may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodities dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital." [55]

A similar but much more comprehensive statement of antitrust objectives was made by Judge Learned Hand in the *Alcoa* case. The opinion there stated: " . . . it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. The Act has wider purposes. Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them."

Moreover, Congress "was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." [56] The Supreme Court, by specifically endorsing this statement has given these views unquestionable authority.[57]

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[55] *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 323 (1897), quoted with approval in *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457, at 467 (1914).

[56] *United States* v. *Aluminum Co. of America*, 148 F.2d 416, at 427 (C.A. 2nd 1945).

[57] *American Tobacco Co.* v. *United States*, 328 U.S. 781, at 813 (1946).

Another purpose which the congressional debates clearly show was in the minds of those who passed the Sherman Act,[58] has recently been stated by Justice Douglas in these terms: "Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it." [59]

Although the courts have often commented on the purposes of the antitrust acts, there seems to have been no attempt to make an authoritative statement of all the objectives. However, consideration of the cases and of the background data makes it clear that these purposes are not only economic but also social and political. The purposes of antitrust policy certainly include at least these objectives:

(A) To protect the public against exploitation by those possessing economic power.

(B) To promote the most efficient operation of the economic system by permitting competition to be the principal determinant of the allocation of capital, labor and commodities.

(C) To protect individual business men and enterprises against unfair or undue exertion of economic power by other business aggregations or enterprises.

(D) To afford the individual the greatest freedom of choice as a purchaser, or an entrepeneur, or an employee.

(E) To secure and maintain diffusion of economic power and diversity of economic control both for its own sake and as an important condition to the existence of a political democracy.

The specification of these objectives obviously does not furnish us with any mechanical or automatic test for determining antitrust

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[58] Hans B. Thorelli, *The Federal Antitrust Policy*, 227, 565 (1955).

[59] Dissenting opinion of Justices Douglas, Black, Murphy and Rutledge in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 534, at 536 (1948).

compliance or violation. The problem of identifying normal competitive activity in the setting of a particular case remains, as well as the problems of determining what exertions of economic power are unfair or improper and what degree of diversity and diffusion of economic power it is reasonable to require and what degree of economic concentration it is reasonable to permit. Nevertheless, recognition of the scope and character of these objectives can be of considerable importance in the application and interpretation of the antitrust laws.

The Current Role of Antitrust

A number of significant conclusions are suggested even by such a summary survey of the economic, political and legal background of the antitrust laws as has been attempted here. First, it is apparent that the task which the antitrust laws impose upon the courts of dissecting the economy and identifying competitive activity is a much more difficult one, in many cases, than the early theorists supposed. Both competition and monopoly have turned out to be highly complex, rather than simple, concepts; and in operation each has proved to have a protean character. As society changes technologically, new elements, such as advertising, arise, and old elements, such as transportation and communication, take on new dimensions. Competition and monopoly (and its associate restraint of trade) take on new forms that are unfamiliar and often subtle. With the development of mass production industry and mass consumption markets the scale of most economic activities has changed. Some see size alone as a vice; others as a virtue. The legal view continues to judge size in relation to its market. But this approach has its difficulties too. Fractions change their significance with the order of magnitude to which they relate. One-fourth of a market measured in thousands of dollars may be quite a different thing than one-fourth of a market measured in billions of dollars. While there can be no substitute for the case by case analysis of situations and facts, it is becoming apparent that the law must grow increasingly sophisticated concerning both business and economics if it is to recognize and distinguish between competition and monopoly. Confusing and perplexing, but inescapable, is the observation that competition is characterized in practice by monopolistic elements and monopoly by competitive elements, and that the pure forms of either, if they ever existed, have disappeared.

In the second place, the law must take account of new elements and forces in the economy the importance of which has been disclosed by recent economic analysis. For example, in the eighteenth century the concept of the market was closely identified with a specific place. Today it is necessary to emphasize that geographical extent is one of the dimensions of the market that must be determined before considering questions of competition or monopoly. Similarly, the variety of goods and brands, the effects of advertising and the difficulty of quality determination by the ordinary consumer have made an analysis of the classes of commodities concerned in competition and monopoly much more difficult. The problem of product differentiation is a vastly different one today than it was when the early cases in this field were decided. The existence and function of such forces as "countervailing power" and the relative strength of the contending parties and forces should be taken into account in reaching those economic judgments which are necessary to the determination of the legal issues in this area.

According to the simplest view of economics, competition and monopoly are matters simply of market structure—the number and relative size of the buyers and the sellers in a given market. The courts, on the other hand, have tended to emphasize the conduct of the parties—whether any action has been taken that can be identified as predatory, coercive, preclusive or restrictive. One of the most experienced and astute economists in this field urges that market performance in terms of variation or uniformity of conduct among the market participants would be the most workable test of competition that the law could adopt.[60] Other economists suggest that market achievement, or the results of market activity in terms of production, quality and cheapness, should be the criterion of workable competition. In the present state of knowledge and theory the law undoubtedly will continue to consider all aspects of market structure, market performance and business conduct in those cases in which it is necessary to determine the "reasonableness" of economic activity. However, some familiarity with current thought in the field is necessary in order to know what the several aspects of market structure, market performance and business conduct are and which may be relevant to different issues.

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[60] Corwin D. Edwards, *Maintaining Competition*, 128 (1949).

A third conclusion, which is perhaps the most disturbing of those that have been forced upon us in recent decades, is that competition is not a *sufficient* condition of economic efficiency. The most serious error made by the classical economists was the supposition that competition, in any form and degree that is probable in reality, would automatically guarantee a stable, prosperous and self-regulating economy. The realization that competition alone is not enough to insure economic equilibrium and prosperity was a long time in coming; but today it is widely recognized in practice, although many still ostensibly cling to economic dogma that give little explicit recognition to this altered viewpoint. Few today challenge the responsibility of government to prevent or ameliorate depressions and to take other activity to stabilize the economy. Whether it is recognized or not, this whole attitude is based upon the new economic insights of Keynes and his school.

Paradoxically enough, those who are the last most loyal devotees of the doctrine of competition formulated in classical economics are those who are usually counted as antagonistic to big business. Some few of this group still cling to the faith that all our social ills are traceable to the growth of monopolistic business and the decline of competition. The depression of the 1930's was due to the mergers and decline of competition in the 1920's; and if only government would strengthen and enforce the antitrust laws, we could restore competition to a state resembling the classical model and our economy would approach its utopian best.[61]

Unfortunately, this line of argument tends to weaken, rather than strengthen, the support for the antitrust laws. Insistence that competition alone is a sufficient condition of economic welfare can lead only to discrediting the legitimate and highly important function of competition. It simply is no longer credible that monopoly is the cause of all our woes, or that competition is the cure for all of them.

The economists and the public are now well aware that there are numerous government policies in addition to antitrust which play an important part in directing and influencing economic activity. Indeed, there are numerous government activities other than antitrust which have a direct bearing on the maintenance of competition. Most obvious are those which involve licensing and regulation of

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61 Henry A. Wells, *Monopoly and Social Control* (1952).

all enterprises in fields such as transportation and communication, and those which involve government grants of monopoly, as in patents. More subtle, but also more pervasively effective, are the effects of government policy in such matters as the construction of the tax scale, the imposition of taxes, the granting of tax favors such as amortization and depletion allowances, control of the banking system and interest rate, the awarding of government contracts, the control and allocation of materials (as well as prices) under the war powers, and the whole burden of compliance with numerous and complex regulations which involve extensive record keeping and reports. If the degree of economic concentration has been increased by the government's activities in such matters, as has been alleged,[62] this is patently a problem with which the antitrust laws cannot cope, and one that requires a political solution.

We must recognize as a fourth conclusion, that although competition is not a *sufficient* condition for economic efficiency, it still remains an *essential* one. The new economic theories have imposed limits and modifications upon the operation of the classical theory, but they have not superseded it. For example, the criticism of Adam Smith's theory of monopoly pricing based upon the argument that a monopolist cannot in modern times secure high prices for his product indefinitely, actually tends to prove the fundamental validity of the classical theory. The argument is that sooner or later modern technology and enterprise will devise and offer to the public some substitute for the monopolized product. But this is saying no more than that technology is capable of introducing some competition into almost any monopoly situation. It is not, and has not been contended that the inevitable tendency of monopoly is not toward uneconomic prices and inefficiency. It is contended merely that a monopoly cannot be maintained indefinitely in the circumstances of a modern technological society. Thus this argument merely asserts that competition is more aggressive and viable under modern conditions than the older economic theories had postulated.

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[62] Hearings and report of Select Committee on Small Business, U. S. Senate, on *Participation of Small Business in Government Procurement* (1950); *Report on Material Shortages by the Select Committee on Small Business*, U. S. Senate, 82nd Cong., 1st Sess., Sen. Report No. 77 (1951); David Lynch, *The Concentration of Economic Power*, 3 *et seq.* (1946); Bruce Catton, *Taxes Into Profits*, The Nation. April 11, 1953, 176:304.

No modern economist (except those committed to a socialist or communist view) contends that competition is not essential to efficient operation of the economy. The divergence in the views of the economists relates to the minimum amount of competition that is required for efficient economic performance and to the manner of measuring such degree. Economists agree that competition is necessary as a spur to and yardstick of efficiency, lacking which any enterprise is almost certain to become inefficient. Even in markets of few buyers or sellers there are forces of competition at work so long as the few enterprises are not merged or co-ordinated by agreement or collusion. Where monopolistic power faces countervailing power, the latter can operate effectively only if there is still some degree of choice offered by competition on the opposite side of the market. No matter how monopolistic competition may become, monopolistic competition is still infinitely better than none. Furthermore, the differences are those of degree. Competition is effective for its purposes to the degree that it is less monopolistic and more free in nature. Competition is the element of flexibility in the economy that permits it to grow and adjust to new conditions. Monopoly is hardening of our economic arteries.

As modern economic analysis leads to the conclusion that competition, despite its limitations and imperfections, is still an essential condition of economic efficiency, so are we led to the further conclusion that antitrust still stands as the only government policy which is capable of directly or effectively preserving competition and preventing or discouraging the formation or exercise of monopoly power. Although all experience to date indicates that the increasing burdens of government regulation, reporting and record keeping, and taxation bear more heavily upon small than upon large business, thus favoring concentration of economic activity, it is at least theoretically possible for these trends to be reversed. In any event, the economic effect of such government policies, whether exerted in favor of economic concentration or diffusion, is indirect, partial and long-range. Even taxation is uncertain and ambiguous in its impact upon this problem, and gives little promise of offering any effective weapon against monopoly. Further, it seems impossible to conceive of any government policy other than antitrust which could even touch the problem of potential collusion among enterprises in markets of few enterprises—which our analysis indicates looms as an even greater

threat to social welfare under modern conditions than the traditional form of naked monopoly power.

Although government regulation or socialization are the alternatives to antitrust, adopted in cases, such as certain public utilities, where monopoly is thought to be inevitable, tolerable or desirable, these do not stand as any adequate substitute for the antitrust policy. Government regulation or ownership might protect the public against exploitation and the individual against unfair exertion of economic pewer, although this result is by no means a certainty. But government regulation or ownership most assuredly cannot offer us wide freedom of choice, diffusion of power and diversity of control. Government ownership or regulation is simply another form of concentration of economic power. It may be argued that if economic power is to be concentrated it is better wielded by the government, which is subject to a greater degree of social control, than by private business. This argument may be granted without in the least weakening the case for antitrust and the diffusion of power. Indeed, the posing of this alternative simply points up the fact that the only workable government policy thus far devised for securing the great objectives of economic justice and political freedom that we seek is that embodied in the antitrust laws.

This suggests the final, and most important, conclusion to be drawn from an analysis of the background and current role of the antitrust policy: The maintenance of our political democracy and our civil liberties is largely dependent upon the preservation of a reasonable degree of diffusion of power and diversity of control in the economy. This is not simply because of the fear that business which is too big will have too much direct political influence. That has been recently denied by a prominent economist,[63] although politicians who may be more familiar with the facts have repeatedly voiced such an apprehension.[64] More pervasive, more subtle and ultimately more influential is the threat to democracy and freedom itself inherent in the concentration of control over the instruments

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[63] See "Slichter Decries Fear of Mergers," New York Times, July 27, 1955, p. 29, reporting speech of Sumner H. Slichter to Stanford Business Conference.

[64] *United States Versus Economic Concentration*, Staff Report to the Monopoly Subcommittee of the Committee on Small Business of the House of Representatives, 79th Cong. (1947) at vii *et seq.*; Final Report and Recommendations of the Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941) at 11 *et seq.*; Hans B. Thorelli, *The Federal Antitrust Policy*, 227, 565 (1955).

of communication, and the growth of increasing economic and social pressure toward conformity to conventional attitudes and standards.

It should not be forgotten that the first of the four basic freedoms for which the United States fought in the last great war was the freedom of speech and expression. John Stuart Mill in his classic essay on *Liberty,* puts liberty of thought and discussion as the essential condition for the rational assertion of truth or the acquisition of wisdom. Protection of the freedom of speech and the press against government interference—then the principal threat—was the first principle written into our constitutional bill of rights. It can hardly be disputed that freedom of communication, the right of the people to learn facts and opinions and to express ideas, is indispensable to the continued existence of a democratic government, as well as basic to other civil liberties and a most important end in itself.

Since effective communication in modern society depends upon industrial and economic institutions, like newspapers, radio, television and movies, the degree of freedom of communication that we have depends upon the degree of diversity among such institutions and diffusion of their control. Morris L. Ernst, who has spent much of his life fighting for freedom of the press from government control, has made an impressive case for the conclusion that monopolistic control of newspapers, radio and motion pictures has done more in recent years to limit the public's freedom of access to information and opinion than government restriction.[65] Regardless of how far the process has already progressed, it is clear that concentration of control of the instruments of communication in a democratic society is dangerous to the existence of the society and intolerable.

There is another aspect to this same matter. Our greatest instruments of communication, newspapers, periodicals, radio and television are all economically dependent upon advertising. These institutions are composed of business enterprises which must continue to enjoy the favor of advertisers in order to continue to exist. They will obviously enjoy greater freedom, in a practical sense, to the degree that they have the support of numerous small advertisers who are individually relatively unimportant to them; and they will enjoy less actual freedom to the degree that they are dependent upon a few large advertisers who are economically important to them. It is some-

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[65] Morris L. Ernst, *The First Freedom* (1946).

times argued that advertisers, being responsible business men, do not attempt to influence the press. It is difficult to determine, or even investigate the truth of such an argument, but it is certainly not universally true. No less a paragon of big business virtue than General Motors has, according to reliable reports, blacklisted as reputable a publication as the Wall Street Journal in order to indicate its displeasure at the publication of certain news reports.[66] It is undoubtedly to the credit of business that this is not a common occurrence. But, just as we cannot tolerate government censorship merely because it is infrequently exercised or used with good intentions, so we cannot permit the economic control of our communications media to be concentrated in the hands of a few, either directly or indirectly. It need not be demonstrated that every use of the power will be vicious in order to show that the existence of such a power is itself a serious threat to democracy. Indeed, even within the government itself we have insisted that there must be division of control and diffusion of power in order to insure that the government shall remain democratic and not become tyrannical. The separation of the powers of the government among the three branches was not a device adopted for the purpose of fostering "efficiency," but was to preclude the exercise of arbitrary power and provide a system whereby the divisions of the government would check and balance one another. The institutions of popular elections, representative government and constitutional limitations are all means of securing the diffusion of governmental power in order to prevent its abuse. It is surely no less important that economic control over the vital instruments of communication should be divided among many rather than concentrated in a few. Because of the complex nature of our economy this requires that the economy generally should be a competitive one with economic control relatively widely diffused.

Economic control exerts other influences than through direct or indirect power over communications media. As the size of big industry gets bigger the number of potential employers grows correspondingly smaller and more and more people become dependent for their living upon a relatively few enterprises. In these circumstances, the expressed opinions of the managing executives of these

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[66] See "G. M. Blacklisting Wall St. Journal," New York Times, June 19, 1954, p. 20, a news account of the action referred to in the text.

enterprises acquire undue importance to many people, particularly employees and prospective employees. This very influence is being used, as Senator Fulbright and A. A. Berle Jr. have recently pointed out, to create an increasing social and economic pressure for conformity to conventional patterns of thought, expression and conduct.[67] Whether the patterns themselves are good or bad is irrelevant. As Mill long ago pointed out, the liberty of the individual is unjustly infringed when the action or thought of the individual is compelled whether the means be physical force in the form of legal penalties, the moral coercion of public opinion or economic pressure. So we find that freedom itself, our basic political—and some would say spiritual—value is largely dependent upon maintaining that diversity of control and diffusion of power in the economy that it is the object of our antitrust policy to secure.

It has long been recognized that the decision of antitrust cases necessarily involved some economic considerations. It should also be understood that antitrust cases are political in the sense that the decisions of the courts in these cases actually make policy as to the character and structure of our society to a greater degree than in any other class of cases, except possibly a few cases in constitutional interpretation. The Supreme Court has said that the antitrust laws have a generality and adaptability comparable to that of constitutional provisions. President Franklin D. Roosevelt said that these laws "have become as much a part of the American way of life as the due process clause of the Constitution." [68] The scope and vitality of the basic liberties sought to be secured by such written laws remains to be given by the courts. That task cannot be properly performed without a firm faith in the validity of the objectives of antitrust policy and a wise understanding of the underlying economic and political principles.

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[67] Sen. William J. Fulbright, *The Mummification of Opinion*, in The Saturday Review, Feb. 12, 1955; Adolph A. Berle, Jr., *Concentration of Economic Power and Protection of Freedom of Expression*, in Annals of the American Academy of Political and Social Science, vol. 300, p. 20 *et seq.*

[68] Letter of President Franklin D. Roosevelt to Secretary of State Cordell Hull, Sept. 6, 1944, quoted on title page of Thorelli, *op. cit. supra* notes 15 and 64.

GOVERNMENT LAWYER

by

MALCOLM A. HOFFMANN

Mr. Hoffmann served for fifteen years in government service, eleven as a special assistant to the Attorney General in the Antitrust Division of the Department of Justice.

INTRODUCTION

by

HON. JEROME N. FRANK

WHAT IS THE BUSINESSMAN'S QUARREL WITH THE ANTITRUST LAWS?

by

BLACKWELL SMITH*

The statement has been made repeatedly that the businessman objects to the uncertainty of the Antitrust Laws and the impositions of conflicting obligations as between the Sherman, Clayton and Patman Acts.[1] It is usually pointed out in this connection that one cannot have the flexible Rule of Reason and certainly, also.[2] The per se or absolute prohibitions are of course more certain than the rule of reason but provide strait-jackets for competition.

The quick brush-off given the desire for more certainty with flexibility and common sense is not good enough. It does not follow from the opposition of clear cut certainty and vague flexibility that we cannot have *greater* consistency of these requirements.[3]

If we have greater understanding of what is legally necessary, we have greater certainty. The Attorney General's National Committee to Study the Antitrust Laws has pointed the way to this approach to greater certainty.

In discussing the standards for judging the work of the Attorney General's Antitrust Committee before a group of businessmen recently the author of this paper touched off a tremendous response based on the frustration arising from never being able to get a clear answer to an antitrust question. It arose thus. The author suggested that the only adverse rating for the Attorney General's Committee's Report would arise from the application of the test of whether it was written by one-armed or two-armed lawyers. This analogy comes from the case of the ex-client who was observed going all over town in the urgent search for a one-armed lawyer. Cornered by his friends

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1 *Effective Competition*, Rep. Sec. Comm. by Business Advisory Council, U. S. Dept. of Comm. (12/18/52).

2 Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* (1954), 259 *et seq.*; Louis B. Schwartz, *The Schwartz Dissent*, 1 Antitrust Bull. 37 (1955).

3 Smith, B., *The Rule of Reason Should Be Modernized*, Univ. of Mich. Symposium (June 19, 1953).

he was forced to explain himself. His answer was "My former lawyer has been driving me crazy. When I put my problem, all I can get is: 'On the one hand, this . . . and . . . on the other hand, that.' I simply have to find a one-armed lawyer."

The heartfelt response from businessmen to this story is indicative of a real need.

Now let us consider what an Attorney General's Report from a lay committee, without legislative or judicial power, *could* do in meeting the need of flexibility with certainty.

First, of course, it could *not* be self-executing. Solutions could be designed and stated, but effectiveness of recommended solutions requires the aid of lawyers, businessmen, administrators, judges and legislators.

Then, proceeding to what the Report *could* do, we find it to start with the matter of asking the right questions.

Some of the dissenters to the Report to the Attorney General feel that the Report was at fault in not addressing itself to the broad question of the adequacy of the overall antitrust legal structure in preventing monopoly and setting up a frame for competition.[4]

The Committee Report is addressed rather to such questions as these:

Question: What *is* the law?

This is only answerable by laying out the pattern of statutes and their interpretation, mainly by the Federal Courts and the Federal Trade Commission. Accordingly, the Committee confronted every Antitrust problem area and examined the more significant aspects of these areas and stated what it found there. The result is a non-codified, although rather complete restatement of the antitrust law as it is.

Question: How should the law be changed?

The overall answer, which is implicit in the Report is that the law has done a pretty good job of carrying out its purpose, but has become ensnarled in conflicts and confusions that should be ironed out.[5]

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[4] Schwartz, *supra*.

[5] *The Report of the Attorney General's National Committee to Study the Antitrust Laws*, pp. 3, 4, 131 (published March 25, 1955).

Question: What should be the policy guide line for ironing out the conflicts? i.e., which choice, protection of competitors, as in the Patman and Maguire Acts or protection of competition, as per the Sherman Act?

The latter policy guide—following the Sherman Act and protection of competition—was chosen and the consistent pattern of the Report is based on carrying thru the implications of this choice in every problem area.[6] The results, including the recommendation to drop the "Fair Trade Laws," offends Mr. Patman and a few professional "small businessmen" but it should please the consumer.

Question: As to each change in the legal picture outlined, does this require legislation, administrative rulings, or mere recognition by all concerned that the restatement of law in the Report is correct?

The Report errs, if at all, on the side of assuming that right thinking, guided by the Report's careful analysis, will do the ironing out job in many cases. Time alone will justify or overturn this somewhat rash assumption.

The non-legislation approach provided by the Attorney General's Committee for answering the foregoing questions would be effective if the courts, business community and lawyers generally, should accept these answers.

Then the question arises whether the answers proffered by the Report *should* be accepted by all. These are my suggested criteria for use by the businessman, in judging whether the answers in the Report are good.

Question: Has the Report resolved doubts in the problem areas by answers which validate the acts of waging competition in good faith in the market?

This kind of an answer is provided in hundreds of spots throughout the Report, including direct treatment of the trouble zones of the Patman Act. The Report tells what should happen in protecting the Patman concept of "good faith meeting of competition," in clarifying the test of "discrimination" as a concept etc.[7]

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[6] Rep. Att'y Gen. Comm., *op. cit. supra.*

[7] Rep. Att'y Gen. Comm., *op. cit. supra,* pp. 131, 135, 179, 331.

Question: Has the Report pointed the way to elimination of conflicts among the Antitrust rules?

Yes. The answers written into the Report consistently choose to protect competition rather than competitors in case of conflict.

Question: Do the answers provided by the Report eliminate the technical booby-traps where businessmen may be found in violation of law by application of theories of competition and monopoly contrary to all business experience.

The answers tend to do this, for example as by minimizing the threat of having non-agreement converted into conspiracy by mere "conscious parallelism"[8] or of an illegal "bathtub conspiracy" being found where a non-monopolistic parent price-fixes the wares of its wholly owned subsidiary.[9]

Question: Are the answers to problems well based in public policy, legal precedent, reason and experience?

From the businessman's viewpoint, if he could know all the Report and what it means, the answer, from the vantage point of this writer would have to be "yes," in most cases. The one notable exception in the excessive reliance on the test of "oligopoly" or "monopolistic competition" as negative tests in merger cases.[10]

Finally, we come to the tests on which the Report gets a low score.

Question: Is the Report understandable to the general public and by business in particular?

Here, the vast majority of the populace, even including lawyers who are not specialists in the Antitrust Laws, will have to vote negatively, if they dig deeply into the Report.

Question: Is the Report persuasive?

Most antitrust specialists who are in private life, with the exception of a few extreme "plaintiffs' " lawyers and a few extreme "defendants' " lawyers would be persuaded, I believe; but there again the broader audience would have to pass.

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[8] Rep. Att'y Gen. Comm., *op. cit. supra*, p. 36.

[9] Rep. Att'y Gen. Comm., *op. cit. supra*, pp. 30, *et seq.*

[10] Rep. Att'y Gen. Comm., *op. cit. supra*, p. 124.

All this leads to the conclusion that a translation and popularization is needed. The need is even deeper than the Report. The need for a "common language" which the Report mentions[11] is serious. The technical economist as he is usually trained in college is likely to acquire notions about "competition" that are diametrically opposite to the ideas of the layman or businessman or lawyers in general.

This sort of thing is dealt with in the Report at various points, as with reference to the academic notion that "discrimination" is proof of monopoly power, while the businessman finds this to be the most normal indication of competition.[12]

"Oligopoly" means a relative fewness of competitors with standard products and to the academician means a type of "monopolistic competition" which is therefore considered bad, due to the elements of monopoly. The businessman and his lawyer find that even though competitors are few the industry is likely to be very competitive, as in automobiles. These people also can wring admissions from the academician that add up to the fact that practically all industries have become illustrative of "monopolistic competition" in that they contain "elements of monopoly" and are not perfectly competitive. Thus we have a head on conflict with reality, where *all* industries are relatively bad in the eyes of academicians who oppose "monopolistic competition." Since the total performance of industry is very good for the consumer and worker, this academic opposition to the mechanism that works so well infuriates and confuses the businessman. The Report points the way in the conflict over "monopolistic competition" by making the practical choices in most cases, but much more remains to be done to link up the bridgeheads of business and law in a way that leaves the track across the bridge uncluttered by barbed wire strung by academicians.

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11 Rep. Att'y Gen. Comm., *op. cit. supra*, p. 315.

12 *Op. cit. supra*, p. 333.

PROGRESS REPORT OF THE WORK OF THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

by

SEN. HARLEY M. KILGORE*

When I became chairman of the Judiciary Committee of the U. S. Senate early this year, I decided that the time had come to look into the antitrust laws. I want the American people to find out to what extent and in what industries competition still exists and whether they are paying higher prices because the antitrust laws are no longer strong enough to do the job that they were supposed to do.

In April the Senate authorized the creation of the antitrust and monopoly subcommittee and I was appointed chairman. Very fine senators from both parties became members of the subcommittee. I selected Joseph W. Burns, a very prominent attorney and an expert in the antitrust field, as chief counsel of the subcommittee. Mr. Burns has had extensive experience both in the Department of Justice and with a private law firm. I persuaded him to take a leave of absence and join me in Washington in doing this very necessary job. We appointed a small staff of highly experienced lawyers and we got to work.

Because of the importance of the merger problem, the Antitrust and Monopoly Subcommittee, of which I was appointed Chairman, decided to look into the merger picture first.

The mergers that have received the most publicity recently have been in the automobile industry. Some of you may recall that in the early days of the automobile industry there were dozens of companies producing cars, but the number got smaller and smaller until it reached nine in recent years. Of these nine, the Big Three—General Motors, Ford and Chrysler—are doing the lion's share of the business.

The other six were losing business and they decided to merge. They formed three companies—Studebaker-Packard, American Motors (Nash and Hudson) and Kaiser (which absorbed Willys).

That means there are only six automobile companies now remaining. What does this mean to the average American when he buys a

* Chairman, Antitrust and Monopoly Subcommittee, United States Senate. *

car? Does it mean that automobile prices automatically go higher? Or does it mean that smaller companies, by getting together, can compete more effectively with the Big Three and keep prices down?

Another field where the problem exists is steel. The U. S. Steel Company is by far the largest in that field. Two steel competitors, Bethlehem Steel and Youngstown Sheet and Tube, want to merge. They insist that a merger will permit them to meet more easily the competition of U. S. Steel. But the Department of Justice, which has this authority under the law, says it will sue in the courts to prevent the merger, which it says is bad for the country.

Who is right—the Justice Department or the two steel companies? To get the necessary information, we called the top executives of most of the automobile companies and the two steel companies as well as the government officials who deal with these matters—the Assistant Attorney General in charge of the Antitrust Division and the Chairman of the Federal Trade Commission.

Mergers are also increasing in the field of banking. To get the facts, we asked the Chairman of the Federal Reserve Board and the Comptroller of the Currency to testify before the Subcommittee.

We also called in single companies in other industries where mergers were on the increase—textiles, chemicals and the dairy field. To round out the picture, we invited the country's top lawyers and economists who specialize in antitrust, either in the leading universities or in private consulting firms, and asked for their views.

The auto and steel and other executives were very frank in telling us the reasons why they felt mergers were necessary in their case. The officials of the Justice Department, Federal Trade Commission and the field of banking gave us the picture from their point of view. The lawyers and economists disagreed among themselves in some respects but they provided valuable information on all parts of this problem.

Our Subcommittee has not reached any conclusions as yet on these hearings which ended July 1.

The views presented by all the witnesses—the practical businessmen who come up against this problem on a day to day basis, the government officials with the duty of supervising these cases, and the private lawyers and economists who deal with these problems—have to be carefully analyzed and coordinated with the rest of the job which the Subcommittee has lined up for itself.

Appearing in the Congressional Record (Senate) of July 30, 1955 at page 10708 is my statement before the United States Senate highlighting the work of the Subcommittee on Antitrust and Monopoly. I should like to repeat that statement in toto. The *Record* reads:

"MR. KILGORE. Mr. President, I ask unanimous consent to have printed in the body of the RECORD a statement on the work of the Subcommittee on Antitrust and Monopoly. This is a standing subcommittee of the Judiciary Committee; and the subcommittee's membership consists of the Senators from Tennessee [MR. KEFAUVER], the Senator from Missouri [MR. HENNINGS], the Senator from Wyoming [MR. O'MAHONEY], the Senator from North Dakota [MR. LANGER], the Senator from Illinois [MR. DIRKSEN], the Senator from Wisconsin [MR. WILEY], and myself, as chairman.

Mr. President, I have had prepared a statement on the work done to date by the subcommittee; and I ask unanimous consent to have the statement printed at this point in the body of the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY SENATOR KILGORE

The Subcommittee on Antitrust and Monopoly is standing subcommittee of the Judiciary Committee, whose membership consists of Senator ESTES KEFAUVER of Tennessee, Senator THOMAS C. HENNINGS, JR., of Missouri, Senator JOSEPH C. O'MAHONEY of Wyoming, Senator WILLIAM LANGER of North Dakota, Senator EVERETT MCKINLEY DIRKSEN of Illinois, Senator ALEXANDER WILEY of Wisconsin, and myself as chairman.

We have an excellent subcommittee whose members have all had considerable experience and background in this field. For several years the members of this subcommittee have felt that the time had come when a comprehensive study and investigation of the entire antitrust field was due in order to determine how the antitrust laws are working. For this reason the subcommittee requested and the Senate passed S. Res. 61 on March 18, 1955, authorizing an expenditure of up to $200,000 to enable this subcommittee "to make a complete and comprehensive study and investigation of the antitrust laws of the United States and their administration, interpretation, operation, en-

forcement, and effect, and to determine the nature and extent of any legislation which may be necessary or desirable to (a) clarify existing statutory enactments, and eliminate any conflicts which may exist among the several statutes comprising such laws; (b) rectify any misapplications and misinterpretations of such laws which may have developed in the administration thereof; (c) supplement such statutes to provide any additional substantive, procedural or organizational legislation which may be needed for the attainment of the fundamental objects of such statutes; and (d) improve the administration and enforcement of such statutes."

The need for this study and the appropriation to carry it out were set forth in a letter which I sent to the Chairman of the Rules Committee on February 21, 1955, which is as follows:

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,

February 21, 1955.

HON. THEODORE FRANCIS GREEN,
Chairman, Committee on Rules and Administration, United States Senate, Washington, D. C.

DEAR SENATOR GREEN: The Senate Judiciary Committee has today favorably reported Senate Resolution 61, proposing a study and investigation of the administration and enforcement of the antitrust laws. The resolution proposes the sum of $250,000 for the expense of this undertaking.

Attention is invited to the fact that the basic law, the Sherman Act, is now 65 years old, the Clayton Act is 41 years old, and the Robinson-Patman Act is 19 years old. During this 65-year period, no attempt has yet been made by the Congress to survey the entire field of antitrust laws with a view toward a comprehensive revision and coordination of these basic laws. Controversy has arisen as to whether these basic policies may have become outmoded. Because of the many differences of opinion about the objectives of these antitrust statutes, suggestions have been made by many sources that a complete study should be made of our present antitrust policy. Criticism has been raised regarding the procedures and remedies of the antitrust laws. The overlapping of jurisdiction of Federal antitrust agencies, highlighted especially by the overlap in jurisdiction of the Department

of Justice and the Federal Trade Commission, has generated demands for congressional action to centralize antitrust administration and enforcement in one source of authority or at least to coordinate through a central agency the concurrent jurisdiction of the several Federal agencies.

Questions have been raised in many quarters as to the adequacy of the present-day antitrust laws in the face of the apparent growth and concentration of economic power in fewer corporations and the consequent effect on the consumer dollar as contrasted with the situation existing at the time of the enactment of the Sherman Act in 1890. In view of the fact that the United States Government is the largest single customer of business and industry, it has been suggested that a study be made of the adequacy of our antitrust structure with relationship to the Government's procurement program and its effect upon the small business of the country and as to whether such large procurements are contributing to the growth of monopoly control, and a weakening of our free competitive economy.

The many questions raised as to the adequacy and present effectiveness of the antitrust laws point up the necessity for a comprehensive study and investigation of the Federal antitrust laws. The committee realizes the enormity of the task and the necessity of providing a staff of technicians thoroughly skilled in the complex field of antitrust law.

Attorney General Brownell recognized the need for a study of the antitrust laws on June 26, 1953, in announcing the appointment of the Attorney General's National Committee To Study the Antitrust Laws. The Attorney General's committee is expected to report its recommendations for revision of the antitrust laws to the Congress some time next month. As the Committee of the Judiciary, under the Legislative Reorganization Act, has jurisdiction over the subject matter of the "protection of trade and commerce against unlawful restraints and monopolies" those recommendations will be referred to the Committee on the Judiciary for consideration. The Committee on the Judiciary will immediately be faced with the task of evaluating and analyzing the recommendations which have occupied the attention of the Attorney General's 60-man committee for almost 2 years. Because of the necessity of reconciling conflicting points of view, extensive and lengthy hearings on these recommendations are contemplated.

In view of the tremendous technological progress of American industry since the enactment of the Sherman Act in 1890, it is impera-

tive that a thorough review be made of the antitrust field in order to achieve such realinement of the antitrust laws as will determine an effective Federal antitrust policy which can be enforced vigorously, effectively, and uniformly to achieve the desired goal of competition in a free economy.

The Committee on the Judiciary respectfully requests that your committee approve the sum set out in Senate Resolution 61 for the expenses for such study and investigation.

Enclosed herewith for the information of your committee are copies of a proposed budget.

With kindest regards, I am,

Most sincerely yours,

H. M. KILGORE,
Chairman.

At the time the resolution was passed by the Senate, there was a proviso that the staff should not be appointed until after the Attorney General's National Committee to Study the Antitrust Laws had made its report to the Attorney General on March 31. Shortly after that date, on April 5, the subcommittee met and appointed Joseph W. Burns as chief counsel and staff director. He immediately commenced to organize a staff of competent, experienced antitrust lawyers, as well as the necessary investigators and clerical help required to carry out so comprehensive a study and investigation. On April 26 the subcommittee met and approved the staff, and a tentative plan of study and investigation.

It is the responsibility of the staff to obtain all the available evidence, facts, and worthwhile opinions on each side of every problem. The subcommittee desires an objective study in order that it may reach conclusions based upon all the available data submitted on both sides of each important question.

The subcommittee is convinced that our economy thrives best under a system of free enterprise and free competition and that the antitrust laws are a major instrument in carrying out this basic philosophy. In the 65 years since this basic philosophy was first set forth by Congress in the Sherman Act, Congress has found it necessary from time to time to pass additional laws to provide for various situations which did not appear to be adequately covered by the Sherman Act.

To a certain extent it was found that completely unrestricted competition might result in the elimination of small business and the creation of the very monopolies which the Sherman Act was designed to prevent. In other instances it was found necessary to create exemptions where on balance the social welfare seemed to be better served by granting specific exemptions from the unrestricted competition which Congress had felt to be desirable as a basic principle. Also the tremendous technological progress which has occurred has created an economy in which the picture is far different from that which was presented to Congress in 1890. The subcommittee is cognizant of the complaint of businessmen and their advisers that the uncertainties of the present laws make it difficult to know what conduct and practices are prohibited. As a result, the subcommittee feels that an objective study and investigation should be conducted of the entire complex antitrust field, to determine whether clarification, unification or revision of the present laws is required.

In recent years there have been many speeches made, articles written, and symposiums conducted in which conflicting opinions were expressed with respect to various antitrust problems. Some of the problems which it has been suggested this subcommittee study include: (1) the adequacy of the present laws in the face of the apparent growth and concentration of economic power in fewer corporations; (2) monopolies and oligopolies; (3) the adequacy of the present laws affecting mergers; (4) price discrimination, exclusive dealerships, and other distribution practices; (5) the effect of the Government's procurement policies on the small business of the country; (6) restrictive patent licenses; (7) the economic and social justification for continuing exemptions afforded to certain industries, business or pursuits, such as electric power, transportation, etc.; (8) problems affecting foreign trade; (9) alleged overlapping of jurisdiction of the Department of Justice and the Federal Trade Commission; and (10) administration and enforcement.

As the first step in our study, this subcommittee held a hearing on May 3 at which four members of the Attorney General's Committee to Study the Antitrust Laws explained the recommendations of the report. These members were: Stanley N. Barnes, Assistant Attorney General, Prof. Milton Handler, Columbia University Law School, Prof. Eugene V. Rostow, Yale University Law School, and Wendell Berge, former Assistant Attorney General in charge of the

Antitrust Division. This was an introductory hearing to enable the members of the subcommittee to learn first hand from members of the Attorney General's Committee the nature of their report and recommendations.

The report of the Attorney General's Committee contains over 80 specific recommendations, which may be divided into 3 categories: (1) recommendations for legislation; (2) administrative changes recommended to the Department of Justice and Federal Trade Commission which require no legislation; and (3) recommendations of changes to be followed by the courts. One of the tasks of this subcommittee is to study these recommendations.

On June 1, 1955, the subcommittee commenced hearings which continued for 15 days and concluded on July 1, 1955. These hearings had a twofold purpose; one was to have some of the country's leading economists from universities, industry, and the Government discuss the nature of our economic structure today, the kind of competition which exists, and the effect of our antitrust laws in aiding competition or retarding it. The other was to consider the important problem of mergers. This economic information is necessary as a background against which the various antitrust problems must be considered.

A major question before the country is what the national economic policy should be with respect to big business in our mid-20th century economy. In determining the effects of large business size on a traditionally competitive system, the subcommittee is interested in learning about great concentration of economic power which results from merging previously independent enterprises. We recognize there is no easy answer to these problems and that we must probe deeply into the causes and effects of such mergers if we are to fulfill our legislative responsibilities. Since the Federal Trade Commission had just issued a report on corporate mergers, this series of hearings began with the appearance of FTC Chairman Edward Howrey and FTC Commissioner John W. Gwynne.

The subcommittee selected the auto and steel industries as the two fields which could prove most profitable in learning about current economic conditions which have brought the question of mergers to public attention. Invited to testify were all six automobile companies —General Motors, Ford, Chrysler, Studebaker-Packard, American Motors, and Kaiser—and Bethlehem Steel and Youngstown Sheet &

Tube. All except General Motors accepted the invitation. At a later stage of our hearings we shall insist upon the appearance of General Motors representatives. These companies were chosen in order to help the subcommittee understand the action of the executive branch in approving two mergers in the auto industry while disapproving a proposed merger in the steel industry.

The subcommittee felt that the proposed Bethlehem-Youngstown merger illustrated the complexity of the problem. Here was an industry in which the dominant producer, United States Steel, controlled about 30 percent of the Nation's steelmaking capacity. Bethlehem, the second leading producer, accounted for 15 percent, and Youngstown, which ranked sixth, for about 4 percent. Would the economy be benefited by allowing Bethlehem and Youngstown to merge so as to provide a combined enterprise perhaps capable of competing more vigorously with United States Steel? Or would the competitive situation in the industry be better if these two enterprises which have already achieved substantial size remain separate? To what extent should big corporations be allowed to expand by acquiring competitors rather than by internal growth?

The Department of Justice, interpreting what it believes was the intent of Congress in enacting the Kefauver-Celler Anti-Merger Act in 1950, has declined to approve this merger. The statute prohibits mergers which may substantially lessen competition or tend to create a monopoly. As in the case of the antitrust laws generally, it does not provide any specific standards or guides but leaves it to the enforcement agencies and courts for interpretation.

As part of these hearings, we also heard witnesses from banking and the textile, chemical, and food industries—from Burlington Industries, Olin-Mathieson Chemical Corp., and the Borden Co., which in the past 6 years have had, respectively, 12, 16, and 17 mergers.

It is not the province of the subcommittee to pass on the legal merits of any of these mergers. However, in our appraisal of the working of the antitrust laws, we want to give due consideration to the views of businessmen who were affected. We are interested in obtaining the facts of actual situations in order to understand the practical considerations which businessmen face. From these hearings the subcommittee received a great deal of valuable information which will be studied in the weeks to come.

The staff is now studying several of the important problems which have been suggested. The complexity of the problems of concentration of economic power and mergers will necessarily involve considerable further study. Particular industries will be investigated to determine the effects of concentration and mergers on competition. In the field of distribution practices, the confusion appearing in court decisions interpreting the Robinson-Patman Act will be examined. In particular, the problem of exclusive dealing contracts, functional pricing, delivered pricing, and price discrimination will be studied.

A problem which will be given considerable study is the overlapping jurisdiction of the Department of Justice and the Federal Trade Commission. One of the inconsistencies resulting from overlapping jurisdiction is that in several instances the same conduct may be prohibited by each agency, with entirely different penalties. It seems incongruous that the infliction of a civil or criminal penalty should depend upon which agency chooses to bring suit.

Some problems have been posed in the area of private treble damage suits. While their effectiveness has increased in recent years, complaints have been made that on the one hand procedural difficulties often handicap a plaintiff in a case where a defendant's conduct clearly calls for severe penalties, while on the other hand treble damages is considered a harsh penalty in cases where the law is vague and a defendant could not be certain he was violating the law. Some have suggested as a solution giving the court discretion in the awarding of treble damages. Others believe Congress should make the penalty fit the offense.

In the field of foreign trade there is considerable study to be done. American businessmen engaging in trade with foreign countries are often met with restrictions on competition in conflict with our laws. We must also consider to what extent our antitrust policy should recognize the desirability of encouraging investments abroad by American companies.

Study will also be made of the procedures for enforcing the antitrust laws both in the courts and administrative agencies. Shortening of lengthy trials and proceedings, and other improvements in procedure, would be of considerable aid in strengthening antitrust enforcement.

We plan to resume hearings shortly after Congress adjourns. At that time we expect to consider distribution practices and foreign trade problems.

The subcommittee has invited each of the 61 members of the Attorney General's Committee to give us the benefit of his views on any of the recommendations contained in the report and any other area of the antitrust laws not covered by the report. Similarly the subcommittee has invited leading professors of law and economics throughout the country to assist us in our study and investigation and present any views or suggestions that they may have for legislation. We are extending a similar invitation to all of the Federal judges who have the burden of interpreting these laws, and finally all groups of business, industry, and other pursuits throughout the country who are affected by these laws and wish to present their views. We especially invite suggestions from all Members of the Congress, both in the Senate and in the House, in order that our study and investigation may be as complete and objective as possible. Our purpose is to ascertain the facts in order to enable Congress to legislate wisely in this field which so widely affects the entire economy.

Among those who have appeared before the subcommittee are the following:

WITNESSES AND DATES APPEARING IN 1955

Hon. Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division, Department of Justice and Cochairman, Attorney General's Committee To Study the Antitrust Laws, accompanied by Robert A. Bicks, executive secretary of the Attorney General's committee and legal assistant to Stanley N. Barnes, May 3, June 7.

Milton Handler, professor, Columbia University Law School, May 3.

Eugene V. Rostow, professor of law, Yale University, May 3.

Wendell Berge, attorney, Washington, D. C., May 3.

Edward F. Howrey, Chairman, Federal Trade Commission, accompanied by John W. Gwynne and Robert T. Secrest, members, Federal Trade Commission; Robert M. Parrish, secretary; Alex Akerman, Jr., executive director; Earl W. Kintner, general counsel; Joseph E. Sheehy, director, Bureau of Litigation, June 1.

Carl Kaysen, assistant professor of economics, Harvard University, June 2.

Louis B. Schwartz, professor, University of Pennsylvania, June 2.

M. A. Adelman, associate professor of economics, Massachusetts Institute of Technology, June 2.

Donald F. Turner, assistant professor of law, Harvard Law School, June 3.

Myron W. Watkins, Boni, Watkins, Mounteer & Co., New York City, June 3.

L. L. Colbert, president, Chrysler Corp., accompanied by George W. Troost, vice president, June 8.

Clare E. Griffin, professor of business economics, University of Michigan, June 9.

Jesse W. Markham, associate professor of economics, Princeton University, June 9.

J. Fred Weston, associate professor of finance, University of California, June 9.

George Romney, president, American Motors Corp., June 10.

Arthur B. Homer, president, Bethlehem Steel Corp., accompanied by R. E. McMath, financial vice president and secretary; C. H. H. Weikel, commercial research division; Donald C. Swatland, attorney; June 14.

George McCuskey, vice president, the Youngstown Sheet & Tube Co., accompanied by John E. Bennett, secretary and general counsel; R. F. Doolittle, assistant secretary and general counsel; June 14.

Edgar F. Kaiser, president, Kaiser Motors Corp., accompanied by Walston S. Brown, counsel; June 15.

H. A. Toulmin, Jr., attorney, Dayton, Ohio, June 16.

Robert R. Nathan, president, Robert R. Nathan Associates, consulting economists, June 16.

Clair Wilcox, Joseph Wharton professor of political science, Swarthmore College, June 21.

Lewis D. Crusoe, executive vice president, car and truck divisions, Ford Motor Co., accompanied by W. T. Gossett, vice president and general counsel; Walker Williams, vice president, sales and advertising; Theodore Yntema, vice president, finance; June 23.

William McChesney Martin, Chairman, Board of Governors, Federal Reserve System, accompanied by J. L. Robertson, member, Board of Governors, Federal Reserve System, June 24.

Ray M. Gidney, Comptroller of the Currency, accompanied by L. A. Jennings, Deputy Comptroller, June 24.

J. Spencer Love, chairman of the board, Burlington Industries, accompanied by: James Rowe, Washington counsel, Stephen Upson, secretary, Burlington Industries, June 29.

Solomon Barkin, director of research, Textile Workers Union of America, CIO, accompanied by John W. Edelman, Washington representative, June 29.

Thomas S. Nichols, president, Olin Mathieson Chemical Corp., accompanied by Roswell L. Gilpatric and Robert E. McCormick, counsel, June 30.

James J. Nance, president, Studebaker-Packard Corp., accompanied by Robert Blythin, counsel, June 30.

Theodore G. Montague, president, the Borden Co., accompanied by John Wood, counsel; Roy W. Wooster, vice president, fluid milk and ice cream division; Joseph O. Eastlack, general manager, fluid milk operations, July 1."

As Chairman of the Antitrust and Monopoly subcommittee of the United States Senate, I am conducting an investigation of this very important problem. I am trying to find out if the laws against trusts and monopolies, the first of which was passed 65 years ago, are still adequate.

Corporations seem to be getting bigger and bigger. Are the various antitrust laws strong enough to deal with the increasing power of these companies?

Some industries are controlled by one company or a few companies. Does that bring less competition?

Some distributors have special arrangements with dealers to whom they sell their products. Are some of these practices bad?

The biggest buyer in the country is the United States Government. The Government buys billions of dollars worth of goods every year from American companies. What effect does this have on the small businessman?

In the field of patents, some companies get together and agree to limit the use of certain patents. Does this prevent newer and better products from reaching the public that would otherwise be available?

The law has placed certain businesses and industries in the category of exceptions to antitrust regulations. Should they continue to be classed as exceptions or is there no reason for continuing to do so?

* * *

There are many problems to be explored in the field of foreign trade, which may have the result of limiting competition.

Two government agencies, the Justice Department and the Federal Trade Commission, are in charge of antitrust enforcement. Do they cooperate in a satisfactory manner or is there unnecessary duplication and confusion?

Are the various antitrust laws being carried out in the spirit which Congress intended?

During the next six months, our staff of experts will survey all these problems and hold a number of public hearings at which witnesses in the field of industry and government will appear.

By January we hope to come up with some answers. We may find that the government agencies involved are not carrying out the law as they should. Or we may find that they do not have the legal powers they need. We will decide whether we need one new big law or perhaps several new laws on specific subjects to help keep competition alive.

If we decide we need new legislation, we will have bills drawn up and presented to Congress for action next year.

* * *

You can easily understand that this is a very big problem, yet it is most important, from the point of view of every single person in this country.

I consider the job on this Antitrust and Monopoly subcommittee as one of the most significant that I have every undertaken in my long Senate career. When the job is finished, I am convinced that the law will stand firmly behind the existence and protection of competition in all parts of American business and industry.

DECISIONS

United States v. *Watchmakers of Switzerland Information Center Inc.* (S. D. N. Y., 1955).

Antitrust action against several Swiss and American organizations and the Swiss defendants questioned the jurisdiction. The most interesting portion of the opinion was the holding that Swiss subsidiaries were "found" in the United States because of the activities of their American parents. The leading case of *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925), held that the activities of a subsidiary were not imputed to the parent for the purpose of establishing jurisdiction over the latter, but Justice Brandeis had there distinguished attempts to hold a parent liable for an act or omission of its subsidiary or to enforce against the latter a liability of the parent. The court in the instant case used this distinction, saying: "It is a fair implication from the opinion that if corporate entities may be disregarded to establish liability they may also be disregarded in establishing jurisdiction over the person insofar as it depends upon the acts upon which the substantive liability was based." Thus, a corporation incorporated outside the United States may be subjected to service of process and suit here because of the antitrust violations of its American subsidiary or parent, even though the foreign company itself does no business here. The requirements of due process, not very strict since *International Shoe*, 326 U. S. 310 (1945), seem the only limitation to this doctrine. The opinion under discussion may also be read more narrowly, however, to require that the foreign company have participated in or consented to the antitrust violations of the American parent or subsidiary.

Libman v. *Sun Oil Co.*, 127 F. Supp. 52 (D. Conn., 1954).

Treble damage action by a gasoline retailer against his supplier. The complaint alleged that plaintiff had been forced to sign a requirements contract in order to get gas, that he was then unable to purchase from defendant at sufficiently low prices in order to meet a retail price war, and that as a result he had been put out of

business. The court held that the complaint stated a cause of action, citing *Standard Stations,* 337 U. S. 293 (1949). The tendency to affect competition adversely, required under Section 3 of the Clayton Act, was inferred from the injury to plaintiff, although plaintiff was not a competitor but a customer of defendant. The case represents a curious inversion of the *Standard Stations* doctrine which rested illegality upon the exclusionary effect of requirements contracts upon new refiners seeking outlets. But in the *Libman* case defendant was accused not of excluding rival refiners from retail outlets but of failing to meet competition and losing one of its own outlets. It is difficult to imagine a successful government suit based on such a theory of injury to competition.

Lyons v. *Westinghouse Electric Corp.* (C. A. 2d, 1955).

In an opinion by Judge Learned Hand the court held that although a state court may have jurisdiction to pass upon antitrust questions raised as a defense in an action for an accounting, the judgment would not constitute an estoppel in a federal court. A federal court, therefore, should not grant a stay of a treble damage action until the state court decides the accounting action.

ACTIVITIES

At the Northwestern Regional Meeting of the American Bar Association, a section will be devoted to a discussion on antitrust law. The meeting will take place at the Lowery Hotel, St. Paul, Minnesota, on October 14, 1955.

The meeting, scheduled to take place from 2–5 P. M. will be under the chairmanship of Jerrold G. Van Cise, and Edward Johnson will be the principal speaker. A question and answer period will follow Mr. Johnson's talk.

BOOK REVIEWS

G. W. Stocking, *Basing Point Pricing and Regional Development,* Durham, N. C., University of North Carolina Press, 1954. Pp. 274. ($6.50.)

Written by an economist long recognized as the outstanding authority on the basing point system, this book thoroughly analyzes the economic consequences of basing point price policies. Prof. Stocking has taken the steel industry as the focal point of his study and has shown the use that industry has made of basing point pricing as well as its economic impact upon the United States. Extremely useful are the clear cut definitions, illustrations and analyses of the theories and practices behind this system of pricing. The best in the field!

Mark Hirschfeld, *Elements of Fair Trade,* N. Y. C., Vantage Press, 1955. Pp. 134. ($2.75.)

This is the third edition by the author wherein he expounds a seemingly radical concept in economics. We use the word radical only to describe a break with traditional and orthodox philosophy. The main theme of Dr. Hirschfeld asks for extended trade relationships among the nations of the world. It is through this free international trade that we will achieve a stable and healthy economic system according to Dr. Hirschfeld.

Other Books

Lawrence Abbott, *Quality and Competition,* Columbia University Press, N. Y. C. Pp. 229. ($3.75.)

The Monopolies and Restrictive Practices Commission, *Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices,* Her Majesty's Stationery Office, London, England. Pp. 111. Price 3s, 6d.

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